UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte LIGIA A. RIVERA, JOE CWIAKALA,
JOHN EUGENE PELUSO, LEE DEMENY,
KAREN LEE DEMENY, WILLIAM ROBERT NEWMAN,
YUNG HSIANG HSANG, MICHAEL JOHN FAULKS,
STEVEN JOHN ROMME and GERALD P. DEGREEN

Appeal 2006-2867
Application 10/771,969
Technology Center 1700

Decided: March 13, 2007

Before EDWARD C. KIMLIN, THOMAS A. WALTZ, and
JEFFERY T. SMITH, *Administrative Patent Judges*.

WALTZ, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on an appeal from the Primary Examiner's refusal to allow claims 81 through 87, 90 through 98, and 111 through 122, as amended subsequent to the final rejection (*see* the Amendment dated Oct. 25, 2005, entered as per the Advisory Action dated Nov. 7, 2005). Claims

88, 89, 99, and 100 are the only other claims pending in this application. These claims have been objected to by the Examiner as depending on a rejected claim but would be allowable if rewritten in independent form, including all the limitations of the base claim (Br. 2). We have jurisdiction pursuant to 35 U.S.C. §§ 6 and 134.

According to Appellants, the invention is directed to a roll of wet wipes comprising a wetting composition with at least about 1 weight percent of inorganic salt (Br. 3). Further details of the invention may be gleaned from representative independent claim 81 as reproduced below:

81. A roll of wet wipes, comprising:

a roll having at least 300 linear inches of wet wipes, the wet wipes having a width of not more than about 4.5 inches; and

a wetting composition comprising at least about 1 weight percent of inorganic salt, based on the weight of the wetting composition;

wherein the wet wipes are in a spiral; and

the diameter of the roll is at least about 2 inches and no greater than about 5.5 inches.

In addition to the admitted prior art (hereafter the APA) and co-pending Application No. 10/664,342, the Examiner has relied on the following references as evidence of unpatentability:

Gordon	US 5,763,332	Jun. 09, 1998
Nissing	US 6,623,834 B1	Sep. 23, 2003

ISSUES ON APPEAL

Claims 81-87, 111-114, 119, and 120 stand rejected under 35 U.S.C. § 103(a) as unpatentable over the APA in view of Gordon (Answer 3).

Claims 90-98, 115-118, 121, and 122 stand rejected under 35 U.S.C. § 103(a) as unpatentable over the APA in view of Gordon and Nissing (Answer 3).

Claims 81-87, 111-114, 119, and 120 stand provisionally rejected under the judicially created doctrine of obviousness-type double patenting as unpatentable over claim 41 of copending Application No. 10/664,342 (Answer 4).

Claims 90-98, 115-118, 121, and 122 stand provisionally rejected under the judicially created doctrine of obviousness-type double patenting over claim 41 of copending Application No. 10/664,342 in view of Nissing (Answer 4).[1]

Appellants contend that Gordon does not disclose a roll of wet wipes, actually teaching away from wet wipes by disclosing wipes that are not wet until an emulsion is ruptured during use (Br. 5-6; Reply Br. 2-3).

Appellants contend that Gordon does not disclose or suggest any antibacterial benefit associated with his encapsulated wetting composition (Br. 6; Reply Br. 2-3).

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[1] According to Office records, we note that Application No. 10/664,342 has issued as U. S. Patent No. 7,179,502 on Feb. 20, 2007. Therefore, these two "provisional" rejections are considered as regular obviousness-type double patenting rejections.

Appellants also contend that, contrary to the Examiner's interpretation, the Specification does not convey that a "wet wipe" can be dry (Reply Br. 3).

Appellants contend that no reference suggests the claim dimensions, and that the Examiner's assertion that "background statements" qualify as prior art is contrary to law (Br. 7-8; Reply Br. 4).

The Examiner contends that the term "wet wipe," as admitted by Appellants, includes both wipes that contain a wet composition before use and wipes that become wet during use (Answer 5).

The Examiner also contends that the size and dimensions of the wet wipes would have been well within the ordinary skill in this art (Answer 3 and 5).

Accordingly, the issues in this appeal are as follows: (1) does the claimed term "wet wipes" include both wipes wet with a composition before use and wipes that become wet during use?; and (2) are the length of the roll, width of the wipes, form of the wipes (spiral form), and diameter of the roll known variables to those of ordinary skill in the wet wipes art?

We determine that the Examiner has established a prima facie case of obviousness in view of the reference evidence, which prima facie case has not been adequately rebutted by Appellants' arguments. Therefore, we AFFIRM all rejections on appeal essentially for the reasons stated in the Answer, as well as those reasons set forth below.

OPINION

A. Obviousness-type Double Patenting Rejections

Appellants do not contest the merits of either rejection based on obviousness-type double patenting (Br. 9). Therefore, we summarily affirm both rejections for the reasons stated in the Answer.

B. Rejections based on § 103(a)

We determine the following factual findings from the record in this appeal:

(1) Appellants admit that wet wipes were known in this art to be used in sheet form, or in spiral form pulled from the center of a hollow coreless roll that has perforated sheets (Specification 1:22-28; Answer 3);

(2) Appellants define "wet wipes" as "any wipe, tissue or sheet ... that is wet or moist or becomes wet during use or prior to use" (Specification 2:3-5; Answer 5);

(3) Gordon discloses wet-like cleansing wipes in a final product roll where the wetting composition comprises at least about 1 weight percent of an inorganic salt (col. 14, ll. 1-24; col. 23, Example III (Table III); Figure 2, element 128; Answer 3);

(4) Nissing discloses providing transverse grooves in single or multi-ply wet wipe material to aid in cleaning surfaces (Figure 5B; col. 3, ll. 40-51; Answer 3); and

(5) Nissing teaches that texture, thickness, and bulk volume per unit weight are desirable features in wet wipe articles (col. 1, ll. 21-33).

It is axiomatic that admitted prior art in an applicants' specification may be used in determining the patentability of the claimed invention. *See In re Nomiya,* 509 F.2d 566, 570-71, 184 USPQ 607, 611-12 (CCPA 1975). During prosecution before the Examiner, the claim language must be given the broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the specification. *See In re Morris,* 127 F.3d 1048, 1054, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997). The Patent & Trademark Office should only limit the claim language based on an express disclaimer of a broader definition. *See In re Bigio,* 381 F.3d 1320, 1325, 72 USPQ2d 1209, 1210-11 (Fed. Cir. 2004). The discovery of the optimum of a known variable is normally obvious. *See In re Woodruff,* 919 F.2d 1575, 1578, 16 USPQ2d 1934, 1936 (Fed. Cir. 1990); *and In re Aller,* 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955).

Applying these legal principles to the factual findings in the record of this appeal, we determine that the Examiner has established a prima facie case of obviousness in view of the evidence as a whole. Giving the broadest reasonable meaning to the term "wet wipe" as defined in Appellants' Specification (*see* factual finding (2) listed above), we determine that this term includes wipes that become wet during use. Accordingly, we agree with the Examiner's claim construction that the term "wet wipes" as used in claim 81 on appeal includes the wipes of Gordon that become wet during use by a slight pressure breaking the emulsion (Answer 5; *see* Gordon, col. 4, ll. 3-22, and col. 5, ll. 17-20).

In view of our claim construction as discussed above, we determine that Gordon discloses a roll of "wet wipes" having an unspecified diameter and size but including a wetting composition comprising at least about 1 weight percent of inorganic salt, e.g., sodium chloride (*see* factual finding (3) above). Use of wet wipes in spiral form with perforations was admittedly well known in this art (*see* factual finding (1) above).

Gordon is silent regarding the size of the roll, the width of the wet wipes, and the diameter of the roll, as specified in claim 81 on appeal (Answer 3 and 5). However, we determine that the unspecified diameter of the finished product roll 128 disclosed by Gordon (*see* Figure 2) would have been well within the ordinary skill in this art, depending on the desired number of wet wipes and thickness of each wipe. Nissing teaches that such parameters are "desirable features" of wet wipes, including the texture, thickness, and bulk (volume per unit weight) (see factual finding (5) above). Accordingly, we determine that finding the optimum of such result-effective variables would have been well within the ordinary skill in this art, absent any showing of the criticality of the claimed values. We note that Appellants have not alleged, much less shown, any unexpected results for the claimed values of these parameters. *See Woodruff, supra; Aller, supra.*

For the foregoing reasons and those stated in the Answer, we determine that the Examiner has established a prima facie case of obviousness based on the reference evidence. Based on the totality of the record, including due consideration of Appellants' arguments, we determine that the preponderance of evidence weighs most heavily in favor of obviousness within the meaning of § 103(a). Therefore, we affirm both grounds of rejection in this appeal based on § 103(a).

C. Summary

The decision of the Examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv) (2006).

AFFIRMED

sld/ls

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